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ABSTRACT

Areas of concern related to grievance arbitration in higher education are examined. Selected arbitration awards, court and National Labor Relation Board rulings, and related literature are reviewed, and probable patterns and trends in arbitration are identified. Potential conflicts between collective bargaining and collegiality (self-governance) include: the variety of institutional types and variations in tenure systems, governance patterns and policies, and institutional missions; the fact that bargaining is essentially a bipartisan system while usual institutional governance processes almost always involve more than two parties; and the difficulty in identifying and defining the employer for the purpose of bargaining. Grievance procedures constitute the method by which disputes concerning application and/or interpretation of collective bargaining agreements are resolved. A review of selected arbitration awards indicates that most cases fall into the following classifications: tenure, promotion, appointment/reappointment, due process, compensation, challenge to arbitrability, work assignment/evaluation procedure, and sex discrimination. Much of the law dealing with the question of arbitrability has been shaped by what has been considered to be mandatory (wages, hours, working conditions); illegal (subjects the public employee is prohibited from discussing); and permissive (subjects that the parties are free to negotiate, including class size and teaching methods). It is suggested that grievance arbitration may provide a more efficient means of conflict resolution than litigation. Rulings and court cases are annotated and a bibliography is appended. (SW)

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ARBITRATION IN AMERICAN HIGHER EDUCATION

This study investigates certain areas of concern related to grievance arbitration in higher education. It reviews selected arbitration awards, court and NLRB rulings, and related literature. The study identifies probable patterns and trends in arbitration.

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ARBITRATION IN AMERICAN HIGHER EDUCATION

The purpose of this study is to analyze, examine, and identify certain areas of concern related to selected arbitration awards in American higher education. The identification process will include a review of literature, arbitration awards, court and NLRB rulings, as well as other available resources. This study should indicate patterns concerning problems, issues, and trends in grievance arbitration in higher education.

Collective bargaining, a social mechanism for conflict resolution, recently surfaced in American higher education; many consider the 1969 City University of New York bargaining agreement as its starting point. Some question the appropriateness of collective bargaining within a collegial setting, claiming faculty senates, councils, or committees enable faculty members to achieve desired goals of shared authority and self-governance. Others claim tenure and academic freedom make collective bargaining redundant. Certain forces, however, contribute to the continued growth of campus bargaining: a decline in enrollment; a reversal of the expansion period of the fifties and sixties; instructional financial difficulties; a shrinking academic job market; increasing external controls, both state and federal; and

increasing attacks on tenure (Ostrander, 1981; Weisberger, 1976; Begin, 1973).

Some collective bargaining concepts and procedures clash with some of the unique characteristics of American higher education institutions. One of the problems encountered in higher education bargaining arises from the difficulty in identifying and defining the employer for the purpose of bargaining. Angell (1977) points out that faculty members perform a triple role of legislator, executive, and employee so closely bound together that it is difficult to separate and consider the employee function alone for collective bargaining. Teaching faculty members are elected to faculty senates and councils, which formulate institutional policy, and may even initiate and formulate new programs. Faculty senates may share in planning budgets and allocations of institutional funds. Faculty members perform as executives within their departments by determining the specifics of classes, hiring, and evaluation of faculty members, assigning work to clerical staff and so on. When acting as a classroom teacher, a faculty member performs as an employee (Tice, 1973).

Institutions, traditionally have perceived self-governance, the deliberation of the community of scholars, as an integral aspect of the academic decision making process. This perception constitutes the basis for an institution's desire for autonomy and the belief in the collegial model. Bargaining, essentially a bipartisan system, clearly clashes with usual institutional governance processes, which almost always

involve more than two parties. Yet, others see unionization as the formulation of interest group-dynamics always present in colleges and universities, and not an incompatible conflict resolution process (Angell, 1977; Tice, 1973).

The lack of uniformity in American higher education accounts for another area of potential conflict. Institutional types vary greatly, ranging from a single community college to a complex state-wide system of higher education; also included in this typology are: vocational/technical schools, state and private universities, and special interest institutions. Other variations include differences in tenure systems, governance patterns and policies, and institutional missions (Tice, 1973).

Researchers find no single solution to potential conflicts between collective bargaining and collegiality. Bargaining agreements vary widely when negotiated. Unit determination problems customarily arise first; then follows determination of the appropriate scope and tactics of negotiation. When a negotiated agreement includes the arbitration of faculty grievance, a third set of problems arise. Weisberger (1976) states the potential for conflict between grievance arbitration and traditional collegial decision making is great.

Grievance procedures constitute the method by which disputes concerning application and/or interpretation of collective bargaining agreements are resolved. Parties to the contract negotiate the scope of the grievance procedure

as they choose. A review of procedures at twenty-four higher educational institutions demonstrate a range from two-five steps in the procedure and a limitation range from broad to narrow. The subject with which a grievance procedure may deal is limited by the provision of the agreement. The agreement must include a provision for arbitration: limitation of arbitration usually follows grievance procedure limitation, with the most common exclusion from arbitration being academic judgment and/or limitation to terms of the agreement. Grievances are most often defined as a "breach, misinterpretation or improper application of the terms of the agreement or arbitrary or improper application of or failure to act in accordance with . . . policies of board related to terms and condition of employment" (Tice, 1973). Therefore, the grievance arbitration process may often be used to resolve rights disputes, and is a very important component of the larger activity of collective bargaining (Oslander, 1981).

The literature indicates that the use of arbitration in higher education apparently follows the pattern established in industry. The Steelworkers Trilogy of Cases, in a ruling by the U. S. Supreme Court, defined the concept of a "presumption in favor of arbitrability" in the private sector. The public sector has increasingly preferred arbitration as a method of resolving grievance disputes. 330 collective bargaining agreements, which include two year, four year and professional institutions, were in effect by 1979, with the majority in the public sector. Brodie (1979) found that of approximately 3,200 arbitration decisions which he reviewed,

only seven percent related to higher education (Levenstein, Newsletter, 1980; Vaccro, 1979; Garfin, Directory).

A review of selected arbitration awards indicates that most cases fall into the following classifications: tenure, promotion, appointment/reappointment, due process, compensation, challenge to arbitrability, work assignment/evaluation procedure, and sex discrimination (see Appendix 1). Arbitration involving the three major issues of tenure, promotion, and appointment/reappointment are concerned with prescribed procedures rather than academic judgment. The majority of contracts exclude academic judgment from the areas of grievance procedures and arbitration; however, most contracts permit the arbitrator to review the application of prescribed procedure even in the areas reserved for academic judgment. Failure to follow prescribed procedural requirements would abridge a persons substitive right to due process; hence, proper academic judgment has occurred if reasonable individuals review the necessary facts and situations and reach a decision. Initial steps of the grievance procedure may remedy gross errors of substative due process by requiring a fair review and correction, and if there are no corrective steps taken then arbitration may follow (Weisberger, 1976; Tice, 1973).

Arbitration rulings are not binding precedents, unlike court decisions. For example, two arbitrators reading the same contract language might reach different or opposing views, hence litigation may be used to appeal arbitration decisions (Tice, 1973). Governmental agencies may not be

able to delegate full authority to a private party (arbitrators), to make decisions that are constitutionally their prerogative. For example, the Connecticut Supreme Court ruled against an arbitrator's award of sick leave days for a full-time faculty member because the award conflicted with the state regulation (844 Conn. 17). In a similar situation an arbitration award benefited those who had participated in an illegal strike and disobeyed a court injunction to return to work. The court ruled that the arbitration award is not enforceable because it contravened public policy (386 N. E. 2nd 47). Arbitration does not establish binding precedents but prior rulings may be considered (Herrick, personal interview; Levenstein, Newsletter).

Much of the significant body of law dealing with the question of arbitribility has been shaped by what has been considered to be mandatory, illegal, and permissive subjects for negotiation (see Appendix 2). For example:

a. Mandatory - wages, hours, and working conditions;

b. Illegal - those subjects the public employee is prohibited from discussing;

c. Permissive - subjects that the parties are free to negotiate, if they so choose, i.e., class size, teaching methods, and existence and composition of a promotion committee.

The enactment of enabling legislation that clearly defines and limits negotiations to wages, hours of employment, and other conditions of employment eliminates much of the permissive area of negotiations. Management's rights must be

protected through the means of written agreement by the inclusion of the management rights clause which has long been used in the private sector (Vaccaro, 1979).

In summary, grievance arbitration, if used effectively, may strengthen the American higher education system; it proves to be a more efficient means of conflict resolution than litigation. Litigation is a costly, time consuming process, whereas arbitration usually results in an expeditious and less expensive grievance resolution. Conflicts in the area of tenure, promotion, and appointment/reappointment may be more readily resolved through the application of grievance and/or arbitration procedures. Institutions with grievance and/or arbitration procedures may find an increase in administrative efficiency, further, grievance and/or arbitration do not necessarily encroach upon the area of academic judgment, the collegiality of the institution, nor institutional autonomy in reference to academic governance.

APPENDIX I

ARBITRATION AWARDS, NLRB AND PERB DECISIONS

TENURE

Administration of C. W. Post Center of Long Island University has been ordered by an independent arbitrator to suspend nine tenured faculty members who have for the last two years refused to either join the faculty union or to pay agency shop fees. The New York Times, August 29, 1979.

PROMOTION

Vermont Labor Relations Board has ruled that Vermont State Colleges' Board of Trustees violated collective bargaining agreement when it refused to grant promotions to faculty who had already been approved by presidents. The Chronicle of Higher Education, 2, October 20, 1980.

Niagara County Community College and Faculty Association of Niagara County Community College. (Case #A78-201, July 2, 1979) Labor Relations Reporter. Labor Arbitration Decisions, 73LA 90-6, September 12, 1979. College was required to fund and grant minimum of 15 faculty promotions under contract requirement for college and legislature.

APPOINTMENT/REAPPOINTMENT

University of District of Columbia Faculty Association/NEA v. University of District of Columbia. (Case No. T4001, December 22, 1978). Gov't. Employee Relations Report, 794: 17-18, January 22, 1979. Board finds university failed to offer teacher full-time job after lay-off from college that eventually merged with University of District of Columbia.

Faculty union at C. C. of Baltimore has sued the institution on behalf of academic employees who were denied arbitration after they received lay-off notices. The Chronicle of A. E., 2, August 13, 1979.

CHALLENGE TO ARBITRATION

Atlantic County Community College and Education Association of Atlantic Community College. (PERC No. 80-11, Docket No. SN-79, July 5, 1979). Gov't. Employee Relations Report, 835: 21, November 5, 1979. Scheduling of class assignments is a managerial prerogative and not subject to collective bargaining.

Board of Trustees and Shoreline Community College Federation of Teachers. Arbitration in the Schools, 107, January 1, 1979. Non-renewal of contract said to be arbitrable, despite college's contention that termination was contractually within administration's authority.

Board of Trustees of Ocean County College and Faculty Association of Ocean County College. (PERC No. 80-34, Docket No. 5N-76-69, September 6, 1979). Gov't. Employee Relations Report, 835: 21, November 5, 1979. Promotional but effect of decisions relating to tenure is required subject for negotiations.

COMPENSATION

United University Professions and appellants asserting objections to agency fee refund and procedures. (AAA Case No. 1530066379, June 6, 1979), Gov't. Employee Relations Report, 878: 22-23, September 8, 1980. Arbitrator finds that bargaining agent for professional services unit of State University of New York gave correct refund to non-union members for using agency shop fees for activities other than those related to collective bargaining.

Rhode Island Junior College administration has right to withhold pay from faculty strikers. Gov' . Employee Relations Report, 857: 25, April 14, 1980.

"Fair Share" deduction requiring all employees to pay their share of costs of representation is to be included in contract between Northeast Wisconsin Vocational, Technical and Adult Education District and its faculty association. Gov't. Employee Relations Report, 862: 24, May 19, 1980.

URI Chapter, American Association of University Professors and Rhode Island Board of Regents and the University of Rhode Island. (AAA Case No. 1139-0025-80, July 1, 1980) Gov't Employee Relations Report, 880: 14-16, September 22, 1980. Professors who struck University of Rhode Island last fall and refused to teach scheduled classes are not entitled to compensation for research and administrative services that they continued to perform.

BINDING INTEREST ARBITRATION

Impassee in negotiations between United Faculty at University of Northern Iowa at Cedar Rapids and Iowa State Board of Regents resolved by compulsory, binding interest arbitration - said to be first resulting from interest arbitration imposed by statute. Gov't. Employee Relations Report, 805: 22-23, April 3, 1979.

APPENDIX II

COURT CASES

Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers, Local 1942, AFT, AFL-CIO (Connecticut Supreme Court, June term, September 18, 1979). Gov't. Employee Relations Report, 844: 17-19, January 14, 1980. Court finds state law requires full-time faculty entitled to 12.5 sick leave days a year rather than 15 days ruled by arbitrator. . . arbitrator's award found to be in conflict with state regulations.

Appeal by Community College Trustees from appellate court's enforcement of arbitration award that faculty who had participated in an illegal strike were able to have preference, pursuant to the collective bargaining agreement, to "extra work," such as summer assignments, over faculty who did not participate in the strike. Held: Reversed. The arbitration award is not enforceable since it contravenes public policy by benefitting those who violate the law at the expense of those who complied with the law. It is also repugnant to public policy in that the award condones and encourages illegal strikes and flagrant disobedience of court injunctions to return to work. Board of Trustees of Community College District No. 508, County of Cook v. Cook County College Teachers Union, Local 1600, 100 LRRM 2723, 386 N.E.2d 47 (III. 1979).

Appeal by union of university employees from denial of injunction to compel university to restore checkoff to union on same basis as had existed prior to enactment of collective bargaining law covering such employees. Held: Affirmed. The university's rescinding of checkoff does not violate the union's constitutional rights, since a rule not guaranteeing checkoff meets the relatively relaxed standard of reasonableness enunciated in City of Charolotte v. Local 660, IAFF, 426 U.S. 283 (1976). Moreover, since checkoff is now a proper subject of collective bargaining, the university should not be forced to forego now what should be reserved for the bargaining table. Main State Employees Assn. v. University of Maine, 395 A.2d 829 (Me. 1978).

COURT CASES - (cont'd)

Appeal by faculty association from Appellate Court's upholding of Michigan Employment Relations Commission's refusal to find university had committed ULP by unilaterally adopting a program in which students would evaluate faculty and such evaluations could affect reappointment promotion and tenure decision. Held: Reversed. Since such evaluations could affect retention or promotion, they involve a term and condition of employment and, therefore, are within the mandatory scope of bargaining. The law should not be construed differently in the case of university professors or of public employment, nor can it be said that evaluative criteria for purposes of tenure and promotion are strictly "educational policy." Dissent: Relying on decisions of courts in Oregon, Kansas, Pennsylvania and Alaska, the Court should use a balancing test so that conditions of employment are not given undue weight over educational policy which in this case recognizes the value of student input. Central Michigan University Faculty Ass'n. v. Central Michigan University, 273 N.W.2d 21 (Mich. 1978). (Vaccaro, 1979)

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